



United States  
Department of  
Agriculture

Food and  
Nutrition  
Service

Mountain  
Plains  
Region

1244 Speer Boulevard  
Denver, CO  
80204-3585

MAY 06 2004

Reply to  
Attn. Of: SP-04-08

Subject: School Food Authorities (SFAs) Responsibilities for Adhering to the Request for Proposal (RFP) When Conducting Procurement Actions, Especially with Food Service Management Companies (FSMCs)

To: STATE AGENCY DIRECTORS - Colorado ED, Iowa, Kansas,  
(Special Nutrition Programs) Missouri ED, Montana OPI,  
Nebraska, North Dakota,  
South Dakota, Utah and Wyoming

As you are all aware, the USDA Office of Inspector General (OIG) in recent years has conducted audits of SFAs that have contracts with FSMCs. As with our memorandum SP 04-06 dated March 18, 2004, FNS is meeting a recommendation in the OIG audit by providing guidance to SAs on responsibilities their SFAs have in order to meet certain program requirements.

The national OIG audit (27601-0027-CH) issued on April 30, 2002, included a recommendation that stated that a SFA must comply with the terms listed in the RFP that it issues, and must require that any FSMC responding to the procurement solicitation do so as well. Further, the recommendation stated that a State agency (SA) may approve deviations from the RFP, but only minor deviations.

In its audits of SFA and FSMC contracts, OIG identified repeated instances in which FSMCs ignored, amended, deleted or changed solicitation and contract terms, including changes to prototype bids and contracts that had been previously approved by the SA. As a result of these actions, OIG identified instances where FSMCs:

1. Failed to pass through the value of USDA donated foods contrary to specific solicitation and contract requirements and
2. Pre-credited the value of USDA donated foods when the solicitation documents did not address precrediting.

While OIG specifically addressed the issue of noncompliance with solicitation and contract documents related to the use of USDA donated foods, and to contracting with FSMCs, the potential effect is much greater. Failure to comply with specific solicitation and contract terms is a violation of the long-standing Program and Departmental regulations regarding competitive procurements and contrary to good business practices. These competitive procurement requirements were first established for the National School Lunch Program in 1978. While minor changes have been made to these requirements over the last 26 years, the fundamental requirements have not changed.

Program and Department regulations require that all potential contractors have an opportunity to compete on a fair and equal basis. Consistent with these regulations, the solicitation documents must clearly set forth all requirements that offerors must fulfill, and all other factors to be used in evaluating bids or proposals. These solicitation documents must also identify the basis upon which the contract award will be made.

When a SFA or a contractor is permitted to ignore or change solicitation requirements, competition has been impaired and the procurement process has been compromised. If procurement has been improper the SFA is prohibited from paying costs of the goods and services improperly procured using nonprofit school food service funds, even if the SFA subsequently enters into a contract for the goods or services. In practice this prohibition means that most SFAs will be unable to bear the costs of a large-scale procurement, such as for services of a FSMC, out of non-food service funds, and so the only appropriate remedy for a procurement deficiency is to conduct a new and proper procurement.

Every SFA must maintain a system of contract administration that ensures its contractors perform in accordance with the terms, conditions and specifications of their contracts. As part of this system, the SFA must monitor and enforce the terms of its contracts. Further, all contracts, except small purchase, that are funded in whole or in part with nonprofit food service account funds, must contain provisions that allow for administrative, contractual or legal remedies for instances when contractors violate or breach contract terms and provide for sanctions or penalties as may be appropriate. A contractor's failure to comply with a specific contract requirement is a violation of the contract that must be addressed promptly by the SFA.

#### Minor and Material Changes:

A situation may arise when a minor change is needed to the solicitation documents or the terms of a contract. Unless prohibited by applicable State or local requirements, the procurement process can continue when a minor change to the solicitation document is made, and then provided to all potential contractors in a timely manner. The same holds true for amending an executed contract. When a minor change is desired, a contract amendment can be prepared by the SFA, and then signed by both parties. However, using these procedures to revise solicitation documents or amend a contract when a material (major) change is necessary is not permissible. If a SA so desires, it may require SFAs to have minor changes approved at the SA-level, but the SA cannot approve a material or major change.

The distinction between a minor change and a material change cannot be quantified for every procurement action undertaken in the CN programs. However, at a minimum, a change is material when other competitors would respond differently to the solicitation document had the other competitors known of the change. For example, if the solicitation document required daily deliveries between 7 am and 9 am, but the selected contractor requests a change in the contract terms to anytime daily deliveries, the change is material. On the other hand, if the contractor requests a change in the contract specifying a daily delivery timeframe of 7:15 am-9:00 am, the change is not material.

When changes to solicitation or contract documents are being considered, the SFA must remember that if the potential contractor drafts the amended solicitation documents, the potential contractor becomes ineligible for contract award pursuant to Departmental regulations.

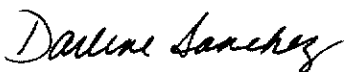
Changes to prototype procurement and contract documents:

In some cases, SAs have developed prototype solicitation and contract documents that ensure program requirements are met. The Department regulations provide that an SFA must make information about its procurement available upon request by the SA when a proposed contract modification changes the scope of a contract (§3016.36(g)(2)(v)). As a result, the SA has the authority pursuant to Department and Program regulations to require prior approval of changes to its approved prototype solicitation and contract documents. Further, when a SA determines that the proposed or actual change to these documents is not acceptable, the SA is obligated to require the SFA take corrective action to remedy the deficiency. SAs have a variety of corrective action options available depending on the severity of the deficiency and the SFA's willingness to take timely corrective action. The options range from requiring the SFA correct the procurement and contract documents, disallowing the use of nonprofit food service account funds to pay for contract costs, requiring the SFA conduct a new procurement, or in the most serious cases, withholding of Program payments until the SA receives acceptable corrective action from the SFA.

SFA responsibilities for correcting procurement and contract deficiencies:

When the SFA is notified or determines, itself, that its procurement process or contract is deficient, the SFA must undertake corrective action to remedy the deficiency as soon as possible. When a contract does not comply with the solicitation document, the SFA may not extend or renew the contract, but must initiate a new procurement action at the end of the current contract period. For example: On September 15, 2003, the SFA identifies a material defect in its FSMC contract. The contract was executed on July 1, 2002, with provisions for four one-year renewals. However, the SFA cannot renew the contract after its current term expires on June 30, 2004, but must conduct a new procurement action.

Please contact our office if you have any questions, at (303) 844-0354.



DARLENE SANCHEZ  
Regional Director  
Special Nutrition Programs